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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	2 CA-CV 2009-0140
	DEPARTMENT A
DONNA PETTET-BISHOP,	
	MEMORANDUM DECISION
Petitioner/Appellant,	Not for Publication
	Rule 28, Rules of Civil
and	Appellate Procedure
WILEY JAMES CLINE,	
Respondent/Appellee.	

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. DO 2001-122

Honorable Fred Newton, Judge

REVERSED AND REMANDED

Law Offices of Robert L. Fruge, P.C.
By Robert L. Fruge
Prescott
Attorney for Petitioner/Appellant

H O W A R D, Chief Judge.

¶1 Appellant Donna Pettet-Bishop[1] appeals from the trial court's denial of her petition to modify child custody, visitation, and support in her child custody case with

[1]Appellant's surname appears in many different forms throughout the record. We use the name that appears in the judgment below, corrected for its spelling in accordance with appellant's notarized signature verifying her petition.

appellee Wiley Cline. She argues the trial court erred by not granting an evidentiary hearing on the petition before ruling. For the reasons that follow, we reverse and remand.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's ruling. *See In re Marriage of Yuro*, 192 Ariz. 568,¶3, 968 P.2d 1053, 1055 (App. 1998). Pettet-Bishop and Cline were divorced in July 2002. In April 2009, Pettet-Bishop filed a petition to modify child custody, visitation, and support in order to change the parenting time for their minor child, T. She requested that T. live primarily with her during the school year and with Cline during the summer, the opposite of the current arrangement. In a telephonic case-management conference, the parties argued their positions regarding the petition and the need for an evidentiary hearing. Shortly thereafter, the trial court ruled that adequate cause had not been shown to warrant an evidentiary hearing and denied Pettet-Bishop's petition pursuant to A.R.S.§25-411(F). This appeal followed.

Applicable Standard for Granting Hearing

¶3 Pettet-Bishop first argues the trial court erred "by requiring [her] to show 'adequate cause' for an evidentiary hearing" because she was only seeking to modify the parenting time, not the actual custody arrangement, and, therefore, the adequate cause standard in§25-411(F) did not apply pursuant to§25-411(H). However, because Pettet-Bishop did not make this argument below, the trial court had no opportunity to consider it, and it is waived for purposes of appeal. *See Woodworth v. Woodworth*, 202 Ariz. 179,¶29, 42 P.3d 610, 615 (App. 2002) (argument not raised before trial court waived on appeal).

Evaluation of Adequate Cause

¶4 Pettet-Bishop next argues the trial court erred in deciding there was not adequate cause for an evidentiary hearing under § 25-411(F). We usually review for an abuse of discretion a trial court's decision whether "adequate cause" for a hearing has been established. *See Pridgeon v. Superior Court*, 134 Ariz. 177, 182, 655 P.2d 1, 6 (1982). But Cline did not file an answering brief, and, "[w]here debatable issues are raised, the failure of an appellee to file an answering brief constitutes a confession of reversible error." *Bugh v. Bugh*, 125 Ariz. 190, 191, 608 P.2d 329, 330 (App. 1980).

¶5 The party bringing a petition for change of custody has the burden of showing adequate cause for a hearing. *Pridgeon*, 134 Ariz. at 181, 655 P.2d at 5; *see also* § 25-411(F). In order to establish such cause for a hearing, the petition must include "detailed facts," § 25-411(F), and contain "more than mere conclusory allegations that the child's best interests would be served." *Pridgeon*, 134 Ariz. at 182, 655 P.2d at 6. And, when the facts are in dispute, the trial court may not make credibility determinations in evaluating adequate cause but must hold an evidentiary hearing. *Id.* at 181, 655 P.2d at 5.

¶6 Pettet-Bishop's petition included detailed facts supporting her reasons for requesting the change. She stated that the high school T. would attend if T. lived with her mother is ranked eighth in the state, but the high school she would attend if she remained with her father is unranked and does not perform as well on other specific measures. In addition, Pettet-Bishop explained that Cline works far from home and is away for days at a time, leaving T. in the care of her stepmother. She also asserted that Cline had made decisions about T.'s medical care without consulting Pettet-Bishop: choosing to have T.

vaccinated with a new vaccine and scheduling a tonsillectomy for her. Furthermore, Pettet-Bishop stated T. had become depressed and anxious since living with her father, and an affidavit from T.'s therapist confirmed that diagnosis. Pettet-Bishop, therefore, has raised a debatable issue as to whether the petition provided "detailed facts" and more than "conclusory allegations" that the change would be in T.'s best interests. *See id.* at 182, 655 P.2d at 6.

¶7 Additionally, at the case-management conference, the trial court found that there was disagreement on the issues and that it "d[id]n't know who to believe in this circumstance." It further stated it was "not real impressed" with the report of T.'s therapist. And it went on to conclude that the therapist's report would "be given little weight" and that, despite the parents' clear disagreement, T. would do well at either school. Accordingly, Pettet-Bishop has also raised a debatable issue concerning whether the court properly engaged in credibility determinations.

¶8 Because Pettet-Bishop has raised debatable procedural and substantive issues and because Cline's failure to file an answering brief constitutes an admission of reversible error as to those issues, we reverse the trial court's denial of appellant's petition and remand for further proceedings consistent with this decision.[2]

[2]We do not preclude further proceedings on remand concerning whether "adequate cause" is the appropriate standard for holding an evidentiary hearing regarding a change in parenting time even though that issue was waived for purposes of this appeal.

Attorney Fees

¶9 Pettet-Bishop requests attorney fees and costs on appeal pursuant to A.R.S.§25-324. Section 25-324(A) permits a court to grant attorney fees and costs "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." Pettet-Bishop does not state upon which of these grounds she bases her request, nor does she provide any information to allow the court to make such a determination. Therefore, we deny her request for attorney fees on appeal. However, she is awarded her costs upon compliance with Rule 21, Ariz. R. Civ. App. P.

Conclusion

¶10 In light of the foregoing, we reverse the trial court's denial of Pettet-Bishop's petition and remand the case for an evidentiary hearing.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge